Copyright in the New Millennium: Resolving the Conflict between Property Rights and Political Rights

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The application of copyright law to new communications technology has brought to fruition the latent conflict between political rights and property rights—that is, the political right of access guaranteed by the First Amendment and the property right of copyright. The original conflict—created by a combination of the printing press and religious controversy in England—was resolved partly by the transformation of a perpetual copyright for publishers to a limited statutory copyright for authors. The author proposes that the computer, the modern analogue to the sixteenth-century printing press, revives this conflict. The original publication copyright has been supplemented by a transmission copyright that gives the copyright holder complete control of access to a copyrighted work even after the work has entered the stream of commerce; and statutory copyright, which was created as a regulatory monopoly, has become a proprietary monopoly.

The author contends that the basic solution to the emerging conflict is to return copyright to its function as a regulatory monopoly. In order for this change to occur, it will be necessary to return copyright to its original proprietary base. The proprietary base—copyright as an easement—serves the interest of three groups: authors, publishers, and users. The author presents the Supreme Court case of International News Service v. Associated Press *as a model for this change.*

I.

Proprietary rights in information and learning can reduce free speech rights to the status of an empty slogan. Chapter 12 of the Copyright Act, entitled Copyright Management and Protection Systems, enacted in 1998 as part of the Digital Millennium Copyright Act (DMCA),[1] exemplifies the core issue of copyright in the new millennium—the conflict between property rights and political rights—and proves the point. The heart of the DMCA is its provisions to prevent the infringement of electronic databases and other digital works by making anti-circumvention devices and their use illegal in order to protect the copyright holder's "property." Thus, the statute provides that "[n]o person shall circumvent a technological protection measure that effectively controls access to a work protected under this title."[2] The DMCA also prohibits the manufacture, sale, or importation of products or services primarily designed to enable circumvention of technological protection measures or that have

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[1] 17 U.S.C. §§ 1201–1205 (Supp. IV 1998).

[2] § 1201(a)(1)(A) (Supp. IV 1998).

limited commercial significance other than for circumvention,[3] and imposes severe criminal sanctions on one who engages in circumvention and the manufacture or sale of the means of circumvention "willfully and for the purposes of commercial advantage or private financial gain."[4] Civil remedies and sanctions include injunctions, impoundment of the decrypted material, the destruction of copied material and copying devices, and treble damages for repeat offenders.[5]

While the statute may be desirable as a matter of trade and commerce, it raises serious constitutional issues. Not since the Licensing Act of 1662[6] in England has copyright been used for censorship to the extent that the DMCA can be used. Just as copyright was a device of public censorship in seventeenth-century England, the DMCA is a device of private censorship in the twentieth-century U.S.

Reduced to its essentials, private censorship involves a conflict between property rights and political rights, and the conflict that the DMCA creates between the two rights is apparent when one analyzes the two concepts. A property right is the right to control and exclude others from access to, and the use of, the property. A political right is a right of all members of the body politic. In a free society, one of those rights is the right of free speech. If the free speech right includes the right to hear as well as the right to speak, to read as well as to print, as reason demands, it seems clear that the copyright protection of the DMCA—especially the anti-circumvention provisions—conflicts with free speech rights. The fact that the right of access may be only an inchoate component of free speech, however, should not be of much comfort to copyright holders who oppose it because it would interfere with their "property." The issue merits a brief discussion.

Free speech is a constitutional right that the U.S. Supreme Court develops only as needed, and publication as a condition for copyright is an issue that was traditionally avoided in copyright cases. The Copyright Act of 1976 ("1976 Act"),[7] however, discarded the publication condition.[8] This was a fundamental change in copyright that will give rise to the need—especially in the use of new communications technology—for the development of the free speech right of access as a plenary right. There are, indeed, several factors suggesting that the Court will soon need to remove the right of access from the free speech back-burner and make it a respected component of free speech rights. First of all, copyright entrepreneurs tend to ignore both constitutional and statutory restraints. For example, the constitutional mandate that copyright protect the public domain and the statutory right

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[3] § 1201(b)(1).

[4] § 1203(a) (imposing five to ten year imprisonment and $500,000–$1,000,000 fines).

[5] § 1203.

[6] 13 & 14 Car. 2, ch. 33 (Eng.).

[7] 17 U.S.C. § 101 et seq. (1994 & Supp. IV 1998).

[8] Notes of Committee on Judiciary, H.R. Rep. No. 94-1476, *reprinted in* 17 U.S.C.A. § 102 at Historical and Statutory Notes 47 (1996).

of fair use are often ignored. Secondly, the Court has already recognized the right, although it remains undeveloped.[9] Third, a reason for protecting the press is to enable it to inform the public.[10] If the public has a right of indirect access through an intermediary, it would be anomalous to deny the public the right of direct access when the occasion arises. Lastly, even if the First Amendment is obscure on this point, the Copyright Clause[11] contains free speech values—the promotion of learning (because it so states), the protection of the public domain (because copyright is for original material for limited times), and the right of public access (because "the exclusive Right" is the right of exclusive publication)[12]—that provide the basis for a remedy.

When we consider these various factors, it seems clear that the DMCA—especially the anti-circumvention provisions—creates a conflict between property rights and the political right of free speech, and makes manifest an obvious, but little recognized characteristic of copyright: it is a device for controlling the conduct of others in relation to a copyrighted work by excluding them from using it, even to the extent of controlling their use of the copy they own in violation of the copyright statute.[13] As Justice Holmes explained in 1908:

> The right to exclude is not directed to an object in possession or owned, but is *in vacuo* so to speak. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong.[14]

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[9] *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (upholding denial of visa to alien advocating communism); Bd. of Ed. v. Pico, 457 U.S. 853 (1982) (plurality opinion) (holding that local school boards must be permitted to establish and apply their curriculum to transmit community values).

[10] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (placing great responsibility upon the news media to inform public).

[11] The Copyright Clause of the U.S. Constitution grants Congress the power: "To promote the Progress of Science . . . by securing for [a] limited time[ ] to Authors . . . the exclusive Right to their . . . Writings. . . ." U.S. CONST. art. I, § 8, cl. 8.

[12] *See* L. Ray Patterson, *Copyright and 'The Exclusive Right' of Authors,* 1 J. OF INTELL. PROP. LAW 1 (1993).

[13] Consider, for example, the current style of the copyright notice, which provides that no one may copy any portion of the work at any time by any means for any purpose without the permission of the publisher. 17 U.S.C. § 107 (1994 & Supp. IV 1998). A variation is that one may copy pages for a fee, e.g. fifty cents per page, the fee to be forwarded to the Copyright Clearance Center. The notices, of course, rarely mention the right of fair use, although § 107 provides that the fair use of a copyrighted work, including use by copying, is not an infringement of copyright. *Id.*

[14] White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring specially).

If the copyright statute gives the holder the right to prohibit a person's access to information, clearly copyright is inconsistent with the constitutional mandate that copyright promote learning, a point that might be irrelevant in an autocratic society, but not in a free one.[15]

The conclusion that the Copyright Clause and the free speech clause may conflict, however, goes against some two hundred years of copyright law during which copyright and free speech rights co-existed without serious complaint. One may reasonably ask why a conflict should have developed during the last quarter of the twentieth century. There are, as I see it, three reasons. One is that free speech precedent is a product of the twentieth, not the nineteenth, century, and there is no basis for claiming that copyright conflicts with non-existent precedent. Another reason is that new technology creates new ways to disseminate copyrighted works, and also creates new ways to deny access to the works disseminated. The third reason is that during the nineteenth, and much of the twentieth century, copyright was a regulatory monopoly limited to the marketing of works and could be defined as consisting of limited rights to which a given work was subject for a limited period of time.

The definition provided in the third reason applies under the 1976 Act, with three major differences: (1) in the nineteenth century, the copyright term was increased, but the longest term was relatively short, forty-two years;[16] (2) to obtain copyright the author had to comply with statutory formalities—publication, notice, registration, and deposit; and (3) the rights granted were specific to the type of work and limited to that work. Thus copyright was the right to publish a book, to copy a work of art, to perform a drama. Presumably this careful delineation of rights implemented copyright as a monopoly to be limited to its constitutional purpose, the promotion of learning, which served the public interest.

Under the 1976 Act as amended, the copyright term has been extended to the equivalent of four generations or more, and all the rights of copyright apply to all copyrighted works, except where manifestly inappropriate.[17] Rights that were formerly defined by terms of art are now defined by the same words as generic terms. The right to copy a work of art, for example, has become a right to copy all copyrighted works, even books. The copyright monopoly of the 1976 Act thus served the copyright holder's private interest in preference to the public interest by

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[15] The argument that this is justified despite the purpose of copyright stated in the Copyright Clause is that copyright gives the copyright holder ownership of "the information" that is copyrighted. But this is contrary to section 102(b) of the Copyright Act, which provides that copyright does not protect ideas, and so forth, because ownership of the work necessarily implies the ownership of the content of the work, which includes ideas. 17 U.S.C. § 102(b) (1994 & Supp. IV 1998)

[16] The terms were twenty-eight and fourteen years until the 1909 Act extended the second term to twenty-eight years.

[17] For example, one would have difficulty performing a stone sculpture.

transforming copyright into a de facto plenary property right. This raises a fundamental issue: how is the public interest served by Congress's transgression of the constitutional limits on its copyright power to grant "authors" an absolute monopoly in their writings? The question is relevant because Congress continues to ignore the limits along the amendment trail. The Copyright Term Extension Act[18] makes the point. How is the public interest served by extending the copyright term to give extant works an additional twenty years protection?

Copyright, in short, has been changed from a marketing monopoly to a proprietary monopoly that gives the copyright holder as much control over a copyrighted work as the title to realty gives the titleholder over a plot of land. The difference, of course, is that the right to control the conduct of others in relation to one's land involves considerations different from those involved in the right to control conduct in relation to books. For example, the right to exclude any and all persons from land is different from the right to exclude any and all persons from copying passages from a book. The fee simple title to land gives the titleholder the right to use the land as he or she wishes. Copyright is the temporary title to information (in various forms).[19] The very purpose of copyright is to encourage the titleholder to make the information available for public use in order to learn, which is contrary to the right of the titleholder to control the use of the work.[20] Furthermore, the policy served by the right to exclude others from one's land is the preservation of the peace to enable the land owner to enjoy the use of the land, which is unique and cannot be reproduced; the policy served by the right to exclude others from using a book is profit for the publisher as assignee of the author. In one instance, the public interest is served; in the other, a private interest is served. And it is useful to note that the line between reading a book and copying passages from it is a fictitious distinction to justify licensing the use of a book after it has been sold, which portends the primrose path down which copyright entrepreneurs seek to lead legislators and judges.

The reason for the term "intellectual property" is to distinguish the property of copyright (and patents) from both personality and realty, and we should not make the mistake of emphasizing the term "property" over the term "intellectual." Equating the different properties is logical error in the form of the one-word-one-meaning fallacy, the assumption being that all property is entitled to the same rights. Unfortunately, the fallacy has some justification in the copyright statute because of the expansion of the copyright monopoly from the single right to publish a book under prior copyright statutes to the multiple rights to reproduce it in copies, to use it to prepare derivative

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[18] Pub.,L. No. 105-298, 112 Stat. 2827 (1998) (providing for a basic term of copyright protection equal to seventy years following the author's death).

[19] One of the interesting ironies the comparison reveals is that the landowner's title ceases with his death to be assumed by grantees designated either by law or will; the "temporary" title to copyright may continue for a hundred years or more without regard to heirs if the copyrighted work is a work for hire.

[20] An example is a book that one has purchased in order to learn.

works, to distribute copies publicly, to perform it (by reading passages from it) and to display it under the 1976 Act. Even so, just because the owner of real and personal property has plenary control to exclude is no reason to give the copyright holder plenary control to exclude, as the 1976 Act does with minor exceptions, some of which are down right trivial.[21]

The effect of giving the copyright holder multiple rights for all copyrighted works is to enlarge the proprietary base of copyright. This is a critical change because the scope of the proprietary base determines the power of the copyright holder to control the conduct of others, both competitors and consumers, in the use of the copyrighted work. The impact of this power becomes apparent when one considers that the content of copyrighted works is information in various forms; that information is the raw material of learning; and that the right to learn is a natural law right protected by both the First Amendment and the Copyright Clause (because free speech values are components of the copyright policies mandated by the clause). And it seems obvious that the larger the proprietary base of copyright, the more copyright becomes a barrier to bar the public from the learning fields except at the whim of the copyright holder, who guards the gate. For with its increase in term, subject matter, and scope, copyright ceases to be merely a limited marketing monopoly and becomes a plenary proprietary monopoly. This may not be the reason for, but it explains the wisdom of, the traditional limitation on the copyright holder's proprietary interest to the market, allowing the copyright holder to control the conduct of competitors, but not consumers.

The 1976 Act, building upon provisions in the 1909 Act, made other changes that enhance the power of copyright entrepreneurs by increasing the height of the copyright barrier. Two conditions of nineteenth-century copyright law were the limitation of copyright to an author's own writings that were published, that is, originality and publication. The first condition minimized free speech concerns because generally one is not deemed to have a free speech right in another's speech until the speech is made public, when the right of access comes into play; and the right of access to copyrighted works was guaranteed by publication as a condition for copyright protection.[22] By eliminating both conditions in the 1976 Act, Congress

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[21] *See* 17 U.S.C. § 110(6) (1994) (stating that "performance of a non-dramatic musical work by . . . a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body of organization" is not an infringement of copyright (but the performer may be liable)).

[22] The publication of one's writings brings the right of access into play because the publication affects ideas, opinions, and attitudes of the public. To say that one can publish his or her writings and control access to them after they have left the stream of commerce—for whatever reason, profit or politics—is to sanction private censorship. Consider, for example, the television station that denies access to videotapes of its live newscasts. Since yesterday's newscasts have no economic value as newscasts, we can assume that the control of access is to preclude use of the tapes in order to preclude their use as evidence should the station be sued for defamation. *See* Pac. & S. v. Duncan, 792 F.2d 1013 (11th Cir. 1986) (prohibiting copying or selling of broadcast news

provided a basis for creating a secondary market for the use of copyrighted works, a significant development in view of the traditional limitation of copyright to the primary market. Copyright is no longer limited to an author's own writings by reason of the work-for-hire doctrine (under which the corporate employer can be a surrogate author) and the compilation copyright (since a compilation can contain public domain material); protection begins as soon as the work is fixed in a tangible medium of expression, that is, created; and copyright holders have created a secondary market by claiming the right to be paid when the purchaser of a copy of a copyrighted work uses that copy.

The U.S. Supreme Court, however, foreclosed the copyright holder's right to control the secondary market for the sale of books in *Bobbs-Merrill v. Straus*,[23] by creating the first sale doctrine. Copyright holders thus had to create a secondary market to have one to control, which they did by persuading Congress to divide the right of publication into two separate rights: the right to reproduce copies and the right to distribute the copies.[24] The motive for the change, apparently ulterior at the time, emerges when one realizes that the right to copy a work independently of distribution provides a basis for claiming that anyone who copies the work without permission, even for his or her own personal use, is infringing the copyright. The change thus provided for the basis for the pay-per-use paradigm, and as a bonus to the copyright industry, it also provided the basis for an intellectual sabotage of the fair use doctrine.

Presumably the codification of fair use was intended to compensate for the enhanced monopoly by giving consumers a fair use right. Since a defined right is a limited right, it was a relatively simple task for copyright holders to limit fair use by redefining the terms of the fair use statute, which they did in the Classroom Guidelines.[25] Thus, to state the amount that one may copy as a matter of fair use is also to state what amount one may not copy without permission. If copying 1,000 words for the classroom is fair use, copying 1,050 words is infringement. The result, of course, is that fair use—touted a sacrifice by copyright holders to benefit the public—became a means of enhancing the copyright monopoly by defining the copyright barrier.

The subtlest aspect of what can be called the fair use scam, however, may be found within the four factors used to determine when a use is a fair use. The fourth factor relates to economic impact and effect on the market. The subtle aspect of that factor was to make the effect on the potential market a factor. This, of course, is a logical thing to do if—and it is a big if—copyright is a proprietary monopoly intended primarily to benefit the author. But the Supreme Court has time and again informed

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programs). Arguably this is the type of private censorship that the free speech values of the Copyright Clause are intended to prevent.

[23] 210 U.S. 339 (1908).

[24] 17 U.S.C. § 106(1), (3) (1994).

[25] H.R. REP. No. 94-1476, at 68 (1976).

us that copyright is primarily to benefit the public interest, and that the author's interest is secondary.[26] There is a good argument, then, that the potential market ploy, because it enlarges the author's interest and diminishes the public interest, is unconstitutional. It provides for a contingent copyright, which arguably is inconsistent with "the exclusive Right" that Congress can grant to authors for their writings.

The relevance of the enlarged proprietary base of copyright is that it gives property rights precedence over political rights, which made it almost certain that the latent conflict between copyright and free speech rights would come to fruition, as it has in Chapter 12 of the Copyright Act. To provide copyright protection for compilations of data, as well as, for example, a collection of short stories in digital form is to subject information and learning to copyright control, despite the limitations in the copyright statute,[27] which copyright holders tend to ignore at their convenience. Moreover, copyright that formerly protected this information against use by competitors has come to protect it against use by consumers, a change accelerated by the computer, which has the effect of giving the consumer some of the characteristics of a competitor by enabling a person to use or to take material without paying for the use. The word "take" is used advisedly, for consumers (as opposed to competitors) have always been free to use copyrighted material without paying for it. Consider the practice of borrowing books from free lending libraries. The self-interest of copyright entrepreneurs, however, has motivated them to take the position that copying a passage from the book is infringement, a position that logically leads to the conclusion that reading a book is a use of the copyright. But copyright was never intended to preclude all uses by a consumer that might produce a profit, for copyright "protection has never accorded the copyright owner complete control over all possible uses of his work."[28] A turnstile, for example, has not yet been placed at the library door to require the payment of a fee for reading a book.

The danger, of course, is not only the creation of a licensing (that is, censorship) paradigm for the use of copyrighted material, but that such an extension of copyright will result in unconstitutional protection for public domain material and kill the first sale doctrine. As the DMCA indicates, copyright follows the profit trail regardless of constitutional limitations. The fact that the white pages of telephone directories were copyright protected for some seventy years before the U.S. Supreme Court held in the *Feist* case that such copyrights were unconstitutional for lack of originality demonstrates the point.[29] Presumably, one purpose of the DMCA is to override the

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[26] *See e.g.*, Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."); Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[T]he limited grant is a means by which an important public purpose may be achieved.").

[27] 17 U.S.C. § 103 (1994).

[28] *Sony Corp.*, 464 U.S. at 432.

[29] Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

Feist ruling, the justification being the ease with which consumers, as well as competitors, can enter an electronic database.

This purpose, however, is not apparent on its face. The only requirement for copyright protection under the DMCA is that the material be in digital form, that is in an electronic database, which effectively by-passes the condition that the material be original. In theory, of course, the protected material must be a work of original authorship under section 102(a) of the Copyright Act, but the statute does not define the content of the database and the collection of material is made a creative act by section 103. While in theory the database copyright will not protect the content,[30] if one is precluded by law from using technology to enter an electronic database of undefined content, the copyright holder is free to determine that content and to dictate the terms of entry, and no consumer has standing to complain even if the database contains public domain material. The DMCA, in short, is a public law that relieves copyright entrepreneurs of having to use private law of dubious efficacy to control access to their databases, a matter of special concern if the database is the sole source for the information it may contain.

II.

Although the conflict between the DMCA and the First Amendment seems clear, some people may not agree that it is consequential because they view copyright as private property. For present purposes, however, the issue is why the conflict should have become an issue. We start with a basic point. At the most fundamental level, the most important question in copyright theory is the nature and scope of its proprietary base. The answer is determined by the condition for copyright, which in eighteenth-century England was changed from the act of registration under the Licensing Act of 1662,[31] to the acts of creation and publication under the Statute of Anne in 1710.[32] In the U.S., copyright formalities—notice, registration, and deposit—became a part of publication as a condition for copyright.

While creation as a condition for copyright in the form of originality was and is part of American copyright law, the condition of publication (and copyright formalities) was and now is not; and even originality has been fictionalized by designating the act of compilation as an act of creation. Despite this cavalier treatment, the issue of the proprietary base of copyright is critical in a free society because as property, copyright is a justification for controlling the conduct of others in the use of copyrighted material. As Holmes explained, copyright "is a prohibition

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[30] 17 U.S.C. § 103 (1994). This is because the database will be a collective work. If the content is data, it will not be protected; if the database is a collective work containing copyrighted works, the individual copyrights of the works provide the protection. The compilation copyright, in short, protects the compilation as a whole, not the contents of the compilation.

[31] 13 & 14 Car. 2, c. 33 (Eng.).

[32] 8 Ann., c. 19 (Eng.).

of conduct remote from the persons or tangibles of the party having the right."[33] Holmes's dictum, however, does not make clear whether the prohibition of conduct of which he spoke relates to use of the copyright or the work. This oversight is not surprising in view of the fact that the distinction is generally ignored, a failing that explains much of the confusion in copyright law.[34]

The distinction between the work and the copyright is so important that I digress here to discuss it briefly. The distinction may appear to be metaphysical, but it is simply an example of an intangible right (copyright) tied to a physical object (a book) that is subject to use. This is contrary to the manifestation of most intangible rights, for example, stock ownership in the form of a stock certificate, the role of which is to be evidence of the right. The manifestation of copyright is in the form of an object to be used. But "the character of the property [copyright] sought to be protected," as the U.S. Supreme Court has explained, "is not the physical thing created, but the right of printing, publishing, copying, etc., which is within the statutory protection."[35] What the Court determined to be true in 1908 continued to be true in 1985. "Thus, the property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple 'goods . . . ,' for the copyright holder's dominion is subjected to precisely defined limits."[36]

Apparently, however, the habit of reification causes most people to merge the copyright and the work in their minds. This view is encouraged by copyright entrepreneurs since the end result is to enhance the copyright monopoly, which may explain why the codification of the distinction in section 202 of the 1976 Act has had little impact. Entitled, "Ownership of copyright as distinct from ownership of material object," the section makes the difference between the copyright and work clear.[37]

The distinction has important consequences. To use the copyright is to exercise a right of the copyright owner. For example, to publish a copyrighted book requires permission from the owner of the copyright, but one need not get permission to read a copyrighted book or sing a copyrighted song in the shower. This distinction between the use of the copyright and the use of the work assumes special importance

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[33] White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring specially).

[34] An example is the DMCA, which protects the work as well as the copyright since one is forbidden from having access to the work without permission.

[35] A. Tobacco Co. v. Werckmeister, 207 U.S. 284, 298 (1907).

[36] Dowling v. U.S., 473 U.S. 207, 217 (1985).

[37] 17 U.S.C. § 202 (1994). While some might argue that to support my point and be completely accurate, the section should be entitled, "Ownership of copyright as distinct from ownership of the work contained in the material object," the argument proves too much. The work itself is not subject to ownership other than by copyright, which is merely a series of rights to which the work is subject. The point is proved by the fact that at the end of a designated term, the copyright ceases to exist while the work continues to become part of the public domain, which makes apparent the distinction between the copyright and the work.

as to books (or literary works) under the 1976 Act, which divided the right of publication into two rights representing the two steps necessary to publish a work: the right to reproduce the work in copies[38] and the right to distribute the copies publicly.[39] The result here is to give the copyright holder the power to control the use of the work as well as the copyright because it does not distinguish between copying by a competitor and copying by a consumer. Eliminating this distinction was in fact the purpose of the change, for it is the basis of the pay-per-use paradigm. Thus, under this scheme, copyright claimants have taken the position that any copying without permission is infringement, even copying a passage or article for one's research file, for which the copier must pay. We can assume that prior to the 1976 Act—certainly in the late nineteenth century—such copying was a use of the work, not the copyright.[40]

Arguably, to say that merely using a work is infringement is contrary to the constitutional goal of copyright, the promotion of learning, for one cannot learn from a work without using it. One use of a copyrighted book, for example, is to read it, a use that copyright has never controlled. Yet, it is beyond question that the new control of access—as the DMCA provides—controls the right to read. To put it bluntly, this is a huge and unconstitutional intrusion by the exclusive rights of the copyright holder that is occurring by a back-door mechanism. And it is no answer to say that the copyright holder can always license access (for a fee), for the right to grant a license is also the right to deny a license.

Returning to Holmes's dictum in *White-Smith*,[41] whether he spoke of the use of the copyright or the work is important because the answer determines the extent to which copyright gives the right to control the conduct of others. If the prohibition applies only to the copyright, the power is to be exercised only against competitors; if it applies to the work, it can also be exercised against the consumer (as the DMCA makes clear). Given the date and the holding of the case in which Holmes spoke, it is almost certain that the dictum relates only to the copyright. The date was 1908, when the nineteenth-century view of copyright as a limited marketing monopoly prevailed, as the holding demonstrates. The defendant's marketing of the plaintiff's copyrighted musical composition in the form of a pianola role did not infringe the copyright of the composition because the pianola role was not a copy. But arguably, the explanation for the holding is that the plaintiff was not deemed to be harmed because it marketed the composition only as sheet music. While the defendant used the work, it did not use the copyright.

The holding is subject to criticism because the defendant made a profit using the

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[38] 17 U.S.C. § 106(1).

[39] 17 U.S.C. § 106(3).

[40] *See, e.g.*, Stover v. Lathrop, 33 F. 348 (C.C. Colo. 1888).

[41] White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring specially).

plaintiff's copyrighted work; but the case was made irrelevant by a provision in the 1909 Act that gave the copyright holder the right to make the first mechanical recording of musical compositions and then the duty to allow others to record the composition.[42] This duty was implemented by a compulsory license, a device that limited the copyright holder's right to control the conduct of competitors.[43] The compulsory license enables a competitor to use the copyright and is a concrete manifestation of the importance of the distinction between the copyright and the work. This importance is that the distinction is the basis for limiting the copyright entrepreneur's control of others in the use of copyrighted material, and thus for keeping the copyright monopoly within its constitutional boundaries. If, for example, the publisher can prevent the teacher from copying an excerpt from a copyrighted book for use in the classroom, arguably the copyright monopoly has been extended beyond the scope of the grant that Congress is empowered to make. And, indeed, there is a logically irrefutable argument that Congress recognized this point in the 1976 Act by designating multiple copies for classroom use as an exemplar of fair use.[44] Publishers, however, have managed to get judicial rulings to enable them to circumvent this limitation in order to control the classroom conduct of both teachers in teaching and students in learning. Two cases warrant mention, *Basic Books, Inc. v. Kinko's Graphics Corp.*,[45] and *Princeton University Press v. Michigan Document Services*.[46] These cases held that commercial copy shops infringed when they made copies at the request of professors for use in the classroom and were not entitled to the fair use defense.[47]

Perhaps there is an argument that copy shops make use of the copyright in reproducing the excerpts for profit, but this view requires a crabbed interpretation of the language of section 107: "[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news

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[42] Act of Mar. 4, 1909, ch. 320, § 1, 35 Stat. 1075 (codified at 17 U.S.C. § 1(e) (1940)).

[43] Despite the fact that Congress negated its holding, arguably *White-Smith* was rightly decided for two reasons: one legal and one related to the claim of equity. The legal reason is the distinction between the work and the copyright, which the Court consistently adhered to in the nineteenth century, and which required the Court to hold as it did. The claim of equity, that the holding was unfair to the author, ostensibly has less substance than it might have if it did not ignore three facts: (1) the author always and inevitably makes use of public domain material in creating his or her work; (2) the enlargement of the copyright monopoly is to the detriment of the public interest; and (3) in the *White-Smith* case, the copyright holder was not the author as creator, but the publisher as assignee. This last point is worth mentioning because historically, publishers have used the protection of the author as a justification for extending the copyright monopoly to their own benefit as assignees of the author.

[44] 17 U.S.C § 107 (1994).

[45] 758 F. Supp. 1522 (S.D.N.Y. 1991).

[46] 99 F. 3d 1381 (6th Cir. 1996) (en banc).

[47] *See* Patterson, *Understanding Fair Use*, 55 L. & CONTEMP. PROBS. 249 (1992); Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. LAW 431 (1998).

reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[48] The important point in interpreting this language is that it refers to the conduct and not the actor; to the right of students and professors, not the duty of copy shops. Apparently, the courts were influenced by the idea that fair use is an excused infringement rather than a right. If this is the nature of fair use, it makes little difference whether the conduct is by the principal (the teacher) or the agent (the copy shop). On the other hand, if fair use is a right, the agent can exercise the right for the principal. The language of section 107—"the fair use of a copyrighted work . . . is not an infringement of copyright"—should mean that fair use is a right. Thus, Judge Stanley F. Birch, Jr., of the Eleventh Circuit made the point in what bids fair to become a famous footnote.[49]

Despite this insight, the violation of statutory language obviously meant to protect the teaching and learning process is not likely to concern many people because the negative impact on students is seen as being minimal when compared to the potential profit for publishers. Students are students for only a limited period of time—and thus members of a constantly changing class—but publishers (or their successors) can go on forever (and professors are subsidized in their scholarship and research). This is what can be called the "localization of consequences" syndrome (students are adversely affected only for a short period of time).

But there are several reasons that the consequences are not local. First, the result of the rulings is that the courts sanction the pay-per-use practice, which enlarges the copyright monopoly beyond its constitutional boundaries because it continues copyright control of a book for use in the classroom after it has been purchased and thus inhibits learning. Second, to give the copyright owners of learning material a veto power on the use of that material in the classroom is to give them the power to affect the educational process upon which, in the long run, a free society depends if it is to remain free. Third, the publishers' claim that they are entitled to be paid when another person uses "their property" is based on a faulty premise. Their property is not the work, but the copyright, and making a copy of an excerpt for study by students (a personal use) is not a use of the copyright and therefore not an infringement, at least if section 107 is given a disinterested reading.

There may be an argument that the copyright holder is entitled to be paid

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[48] 17 U.S.C. § 107 (1994).

[49] Judge Birch stated:

> Although the traditional approach is to view 'fair use' as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right.

Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

whenever one uses a copy of his or her copyrighted book that has left the stream of commerce and is on the library shelf. But proof that such an extension of copyright power is constitutional is hard to find. There is a paucity of evidence that the framers intended that copyright, which enables publishers to charge a sales tax, should also empower them to charge a use tax. To paraphrase John Marshall's dictum that the power to tax is the power to destroy,[50] the power to tax the use of learning materials is the power to control the learning process.

III.

It may be that the expansion of the proprietary base of copyright and the concomitant enhancement of the copyright holder's power to control the conduct of others in the use of copyrighted works is a good thing, even though it is a threat to free speech rights. It is not, however, a good thing that lawmakers, both legislative and judicial, have wrought the change under the influence of copyright entrepreneurs, whose self-interest precludes a public interest perspective of the changes they promote.[51] It is not coincidental that most of the rules they promote are legal fictions that provide additional protection for copyright entrepreneurs, for example, that the employer of the author is the author.[52] My purpose here is to provide an explanation of why they have been so successful in overriding the public welfare and then to suggest what needs to be done to correct the situation.

First, it will be useful to note the motivation for the change, a new source of profit. New communications technology has made pay-per-use feasible, for it enables copyright entrepreneurs to market material directly to the consumer in piecemeal fashion. This practice creates a marketing paradigm different from that originally developed for copyright, which was to produce a physical object (a book) that was sold to booksellers, who sold it to consumers, who were free to use it as they wished, even to resell it.[53] The reproduction of a book, of course, was beyond the capability of the consumer, which made the risk of his or her invading the copyright domain minimal. The only person against whom the copyright holder needed protection was a competitor who had the capability of reprinting books as a literary pirate. Thus, copyright did not protect against consumers because copyright was a marketing

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[50] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

[51] Professor Jessica Litman has shown the influence of the copyright industry on the legislative process in two brilliant articles, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987); *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989). These articles should be required reading for anyone interpreting the copyright statute, especially judges.

[52] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 743-744 (1989); *see also* 17 U.S.C. § 201(b) (1994) (deeming employer the "author" of work made for hire).

[53] This right is protected by the first-sale doctrine, 17 U.S.C. § 109 (1994), a codification of *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

monopoly and to protect the monopoly, it was necessary to protect copyright against competitors but not consumers. Copyright entrepreneurs, however, have used the fact that new technology enables the consumer to take material without paying for it as a justification for increased protection to enhance their monopoly in the ever-present interest of greater—and windfall—profits. Arguably, the limits on Congress's power are intended to prevent the copyright monopoly from being used to gain windfall profits, which, of course, usually come at the expense of the free speech right of access.

The traditional marketing paradigm served Anglo-American copyright for some four centuries, from the origin of copyright in the middle of the sixteenth century.[54] Arguably, the development that in the eyes of copyright entrepreneurs made the paradigm inadequate was not the computer, but the high speed copying machine, which presented a threat that publishers turned into an opportunity. If the consumer could reproduce the copyrighted work with ease, the obvious solution was to require the consumer to pay for the privilege, whether the work was copied in whole or in part. This solution, however, was not necessarily compatible with the 1909 Copyright Act, which gave the copyright holder the right to "print, reprint, publish, copy and vend"[55] the copyrighted work. The consumer who copied, but did not vend the work, would not infringe the copyright because he or she did not sell the copy. There was, of course, an argument that copying alone was infringement, but that interpretation was contrary to legal culture, for the result would enable the copyright holder to require the consumer to pay for using the work after having purchased it.

The most effective way to change legal culture is to change the law, and the opportunity to change copyright law came with the proposal for updating the 1909 Copyright Act that resulted in the 1976 Act. The process required some twenty years, evidence that it would make a fundamental change in copyright law, providing time enough to dull any concerns about adherence to the limitations the Copyright Clause imposed on Congress's copyright power, for example, the limitation of copyright to published works. The evidence that the framers understood copyright as applying only to printed books is so overwhelming that it constitutes proof beyond a reasonable doubt. But Congress ignored the proof and, in 1976, made changes that reshaped copyright, presumably at the behest of the industry because the changes benefited copyright entrepreneurs in preference to the author as well as the public. As a prelude to dividing the right of publication into two separate rights, the right to reproduce the work in copies and the right to distribute the copies publicly, it provided statutory copyright for unpublished works.[56]

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[54] *See generally* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968) (discussing the history of copyright).

[55] Act of Mar. 4, 1909, ch. 320, § 1, 35 Stat. 1075 (repealed 1976).

[56] The argument that the change was good because it eliminated dual copyright protection, the common law copyright of the states, and the statutory copyright of the federal government was based on a fallacy. The common law copyright was not a copyright; it was only the right of first

The motivation for the change becomes clear in retrospect; it was to prepare the way for the pay-per-use paradigm, which made no sense so long as the right was to publish, that is to copy and sell the copies. This change is relevant to copyright in the new millennium for this very reason, but also because it enlarged the proprietary base of copyright, a change that has had more impact in its collateral than in its direct consequences. The effect of broadening the proprietary base is to narrow the distinction between the copyright and the work, a significant consequence in view of the fact that the limitations the Copyright Clause imposes on Congress seem to require that the distinction be maintained. The fact that copyright is to promote learning, is to be limited in time, and requires an original work, suggests that copyright is a limited right to which a given work is subject, the exclusive right to publish. This is a narrow proprietary base, indeed, although today, the exclusive right should be construed as the exclusive right to market a work because in 1787, the only way for the author to market his or her writing was to publish it. The irony, of course, is that by eliminating publication as a condition for copyright, Congress gave the copyright holder the option of publishing or not publishing, while retaining all the rights and privileges that copyright confers. Arguably, the option came at substantial cost to the public interest because it eliminated the condition that copyright promote learning by ensuring access.

IV.

The enlarged proprietary base of copyright was essential groundwork for the DMCA because it added a new function of copyright—the protection of a service—the same function that the DMCA would later serve. The result is a transmission copyright in addition to the two traditional types of copyright, the publication copyright and the performance copyright. The transmission copyright is derived from the common law performance copyright for dramas and musical compositions and was created by the 1976 Act, which gave the performance right equal status with the publication right, in part by downgrading the latter, which had always been a condition for American copyright.[57] The publication requirement, however, could be an obstacle to the copyright protection for performance works, a point Congress recognized in the 1909 Act by providing statutory copyright without publication for works not reproduced in copies for sale, of which dramas and musical compositions were two examples.[58] The 1976 Act removed the obstacle by providing that copyright comes into existence as soon as a work of original authorship is fixed, that is, created. This fundamental change in copyright law paved the way for the transmission copyright because registering the transmission copyright before the transmission

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publication.

[57] 17 U.S.C. § 101 et seq. (1994 & Supp. IV 1998).

[58] Act of Mar. 4, 1909, ch. 320, §§ 11, 35 Stat. 1078 (repealed 1976).

would result in copyright registration for a non-existent work.[59] The most prominent example of the transmission copyright is copyright for the electronic signals of live television broadcasts.[60] The DMCA provides for ultimate control over such electronic transmissions. While television gives the copyright holder control over the transmission of the work only at the sending end, the DMCA gives the copyright holder control at both the sending and receiving end; that is, it gives the copyright holder complete control of access.

The transmission copyright thus protects a service in the guise of protecting property and is the model that is likely to be widely used for the future. The question is whether it creates a conflict between property rights and political rights that is too great for it to survive in the American scheme of constitutional copyright, a question that has been confused by the importation of natural law into American copyright jurisprudence. Because the natural law copyright provides a perspective that enables judges to see copyright—which under the Constitution is to be a regulatory monopoly—as an author's property right, they can almost always be persuaded that the question relates to property rights, not free speech rights. As one court explained, "[t]he First Amendment is not a license to trammel on legally recognized rights in intellectual property."[61] The court did not, however, examine "the legally recognized rights"[62] and as its smug assertion suggests, a major harm of copyright as a proprietary monopoly is that it obscures the sacrifice of free speech rights on the copyright altar.

We can eliminate the natural law confusion by looking to the beginning of the statutory copyright in England, the Statute of Anne in 1710. For those not familiar with copyright history, it is useful to point out that the relevance of an English statute of almost three centuries ago is that its title was the source of the language of the Copyright Clause.[63] And because the English act was construed in two different cases reaching opposite results within eighteen years of the Constitutional Convention in 1787, we can safely assume that both cases were familiar to the framers. If so, then

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[59] The copyright statute provides that the copyright of a television broadcast is to be registered within three months after the broadcast. 17 U.S.C. § 411(b)(2) (Supp. IV 1998).

[60] The argument that the protection is for the "fixation" of the broadcast ignores two points. The "fixation" requirement is a fiction to comply with the constitutional limitation of copyright to an author's writings; and the idea that a videotape of a football game is a writing is a fiction. Thus, we have a fiction on a fiction, which has expanded the copyright monopoly exponentially.

[61] Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1185 at syllabus (5th Cir. 1979).

[62] *Id.*

[63] The title of the Statute of Anne read: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." 8 Ann., c. 19 (Eng.). The Copyright Clause, omitting the patent clause, reads: "The Congress shall have Power . . . To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive right to their . . . Writings." U.S. CONST., art. I, § 8, cl. 8.

the following two cases can be read as an annotation to the Copyright Clause: (1) *Millar v. Taylor,*[64] a King's Bench decision, telling us what it does not mean; and (2) *Donaldson v. Beckett,*[65] a House of Lords decision, telling us what it does mean.

Briefly, *Millar* was a case in which the London booksellers sought to overcome the limitations that the Statute of Anne imposed on copyright by importing into copyright jurisprudence the natural law in the form of the common law copyright. They succeeded in their goal, but their success was short lived. Five years after *Millar,* the House of Lords overturned its ruling in *Donaldson* and limited the natural law/common law copyright to the author's creations prior to publication. After publication, the author's only protection was the statutory copyright.[66]

The Lords interpreted the Statute of Anne so as to protect the purpose of the statute, but they rendered a compromise decision in doing so and created the common law copyright as the author's property right before publication. The compromise may have been necessary from a political standpoint, but it has proven to be unfortunate from a jurisprudential standpoint because of the impact of the common law copyright on the American statutory copyright. The natural law copyright came to the United States as the common law copyright, which was deemed to be a plenary property right of the author. As the Supreme Court explained in 1907, "the property of the author or painter in his intellectual creation is absolute until he voluntarily parts with the same,"[67] that is, publishes it. Since there was no federal common law, the common law copyright was a matter of state law, and it should not have tainted the statutory copyright of federal law. But the idea that the common law copyright was the author's absolute property combined with the author as the named beneficiary of the federal copyright inevitably meant that the common law copyright would, by osmosis if nothing else, shape ideas about the nature of the statutory copyright. The culmination of this influence was the elimination of publication as the dividing line between the two copyrights. Removing publication as a condition for statutory copyright gave credibility to the claim that the proprietary base of the statutory copyright should be the same as that of the common law copyright.

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[64] 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

[65] 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774); 2 Bro. P.C. 129, 1 Eng. Rep. 837 (H.L. 1774); 17 Cobbett's Parl. Hist. 953 (1813).

[66] England thus rejected the natural law copyright in favor of the statutory grant copyright, which the framers constitutionalized. The continental countries embraced the natural law copyright and have, so to speak, constitutionalized it in the Berne Convention. Since the United States is now a member of the Berne Convention, copyright holders have used the membership as a justification for incorporating natural law ideas into American law (i.e., the elimination of the formalities). This raises an important issue. Is Congress, in enacting copyright legislation, to be governed by the Copyright Clause or the Berne Convention? One point to remember is that in contrast to the statutory grant copyright authorized by the Copyright Clause, the natural law copyright is primitive in nature and contains no free speech values.

[67] Am. Tobacco Co. v. Werckmeister, 207 U.S. 284, 299 (1907).

When we read the Statute of Anne, however, it is clear that it was primarily a statute to regulate trade, not to benefit the author. While this view of the statute is ostensibly contrary to the view that statutory copyright is an author's copyright, in fact it is not. A word of explanation is in order. Prior to the Statute of Anne, copyright was owned by publishers, and indeed, the early copyright—the stationers' copyright—was not even available to authors because it was limited to members of the Stationers' Company, a class that did not include authors. The copyright statute changed this custom and for the first time vested ownership of the copyright in the author, which supports the conclusion that statutory copyright is an author's right. But given the resentment against the booksellers' monopoly of the book trade, it is easy to see that the vesting of copyright in the author was more to control the monopoly than it was to benefit the author. The point is supported by the fact that copyright was available only for printed books; if the intent had been to benefit the author, the statute surely would not have ignored the author's right prior to publication and would have recognized the author's right in unpublished works, as did the House of Lords in *Donaldson*[68] and Congress in the 1790 Act.[69]

The provisions of the statute itself—compared to the stationers' copyright that was created by the registration of the title of a work and lasted in perpetuity—are evidence that the Statute of Anne was essentially a trade regulation. The new statutory copyright was for new works that were printed, and lasted for two terms of fourteen years each, the renewal term to be available only to the author but only if the author were living at the time of renewal. Otherwise, the work went into the public domain. The most persuasive evidence of the statute's trade regulation function, perhaps, is the fact that it contained extensive provisions for a remedy if the price of books was too high and provided a qui tam action to enable private citizens to perform the role of public prosecutor.[70] Excessive price, the characteristic of a monopoly, was thus a

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[68] *See supra* note 65.

[69] Section 6 provided:

> *And be it further enacted,* That any person or persons who shall print or publish any manuscript, without the consent and approbation of the author or proprietor thereof, first had and obtained as aforesaid, (if such author or proprietor be a citizen of or resident in these United States) shall be liable to suffer and pay to the said author or proprietor all damages occasioned by such injury....

1 Stat. 124; 1st Cong., 2d Sess., c. 15 (1790).

[70] 8 Ann., c. 19, § 4 (Eng.). The statute provided that "any person or persons" could make a complaint if they conceived the price of any book to be too high, and empowered the authorities to make an inquiry, and upon a determination that the price was too high, to set an appropriate price. If the settlement was violated,

> in every such case such bookseller and booksellers, printer and printers, shall forfeit the sum of five pounds for every such book... sold or exposed to sale, one moiety thereof to the Queen's most excellent majesty, her heirs and successors, and the other moiety to any person or persons that shall

trigger for direct, rather than indirect, regulation.

V.

The proposition that American copyright is a regulatory monopoly is the perfect example of Justice Holmes' dictum that we need study of the obvious more than investigation into the obscure.[71] Because copyright is a monopoly, a statute that provides limitations and exceptions to copyright to the extent the 1976 Act does cannot be properly classed as anything other than a regulatory monopoly. Consider, for example, the right of fair use (regulation in favor of the consumer); the compulsory licenses (regulation in favor of competitors); the author's termination right (regulation in favor of the author); and the limited copyright term (regulation in favor of the public). The question, then, is not whether copyright is a regulatory monopoly, but why this truism has been continually ignored. The answer, I think, is copyright culture. A fact that we often overlook is the extent to which our thinking is culture bound to the extent that it often resists reason and logic.[72] If the culture is that copyright is an author's property right, that culture is reason enough to reject copyright as a regulatory monopoly.

My purpose at this point is to examine why copyright as a regulatory monopoly is necessary to resolve the conflict between property rights and political rights for the new millennium. There are three ideas to be developed: (1) the regulatory concept of copyright has been undermined by the proprietary concept of copyright that has resulted in a dual theoretical basis and a copyright law that contains irrational rules; (2) copyright as trade regulation provides the basis for a body of coherent and rational rules; and (3) the misappropriation rationale of unfair competition, i.e. trade regulation, of *International News Service v. Associated Press*[73] provides a better model for copyright than the author's proprietary right model.

A. *The Dual Theoretical Basis of Copyright*

The constitutional concept of American copyright as a regulatory monopoly for marketing works has been corrupted by the theory that copyright is a proprietary monopoly of the author. The author's right theory of copyright based on natural law is superficially appealing but fundamentally flawed because a natural law copyright

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sue of the same, to be recovered, with costs of suit, in any of her Majesty's courts of record at *Westminister*.

The *qui tam* action indicates the extent to which the statute was regulatory in nature.

[71] White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring specially).

[72] What other explanation is there for racial, religious, and ethnic prejudice?

[73] 248 U.S. 215 (1918).

is a primitive copyright that benefits only the author and the author's publisher as assignee. Since it is different from the statutory grant copyright permitted by the Copyright Clause, it creates a dual theoretical base for copyright that is a significant impediment to rational copyright jurisprudence. Ambiguous copyright theory is, of course, fertile ground for legal fictions that benefit the publisher to the detriment of the author because the author is the designated beneficiary of copyright and it is therefore not necessary to engage in legal fictions to benefit the author. Legal fictions, in turn, produce irrational rules as measured by the public interest. In a constitutional scheme of copyright, reason cannot explain the following: (1) how an author's statutory monopoly that comes into existence as soon as a work is created, serves the public interest; (2) why the act of selecting, arranging, or coordinating public domain works is an act of creation that merits a three or four generation monopoly; (3) why an employer of an author, including corporations, should be designated as an author; (4) how the electronic signals for television broadcasts are a writing; or (5) how it is that a computer program is not a process or procedure that the statute says copyright does not protect.

The DMCA demonstrates the relevance of these fictions to copyright for the new millennium, which is their utility in circumventing the limitations on Congress's copyright and free speech powers, the former being calibrated, the latter being absolute. An electronic database, for example, may be a compilation created as a work-for-hire (which makes the employer the author) that may consist of public domain facts (which are not copyrightable), access to which may be permitted only on a pay-per-use basis (which is inconsistent with the promotion of learning). The DMCA, in short, treats copyright as a proprietary monopoly that gives the holder complete control of access to information and learning, as if copyright were the fee simple title to real property rather than a limited statutory grant. We should not forget that proprietary rights in information and learning can reduce free speech rights to the status of an empty slogan.

There are, of course, explanations for the logical solecisms in the form of legal fictions, and to point out their infirm intellectual foundation is not to say that they are all without merit, even if they do fulfill the self-serving goals of copyright entrepreneurs. The measure of the constitutionality of the rules, however, is not how they serve copyright holders, but whether they also serve the public interest. While the latter term is notoriously subjective, the Copyright Clause provides its measure with the policies it mandates: the promotion of learning, the protection of the public domain, and public access. The writing of a book, of course, is an insufficient condition for learning; for it is the distribution of the book that promotes learning. The requirement of an original work protects the public domain—protection that is weakened when the public domain is invaded for the compilation copyright. And to grant copyright without publication defeats the policy of public access. We can assume that it is not coincidental that the effect of the legal fictions is to provide additional copyright protection more for the benefit of the manufacturer of books than

for the creators of manuscripts.

The important point, however, is the reason used to justify the irrational rules, which is that copyright is a proprietary monopoly of the author as a matter of natural law. This means that the rules do not distinguish between the copyright and the work; for under natural law, the absolute property of the author, acknowledged by the U.S. Supreme Court in *American Tobacco Co. v. Werckmeister*,[74] could only mean that the author owned both. Thus, one effect of legal fictions is to encourage courts to treat the copyright and the work as one property so that ownership of the copyright entails ownership of the work, a treatment that finds support in the five (now six) rights in section 106 of the 1976 Act.[75] There is nothing for a copyright holder to do with a book other than to reproduce it in copies, to use it to prepare derivative works, to distribute copies to the public, to perform, or to display it publicly.

Thus, the extensive grant of rights effectively obscures the distinction between the copyright and the work. And as the DMCA proves, the major effect is to empower copyright entrepreneurs to negate the three policies of the Copyright Clause: the promotion of learning, the protection of the public domain, and public access.[76] Therefore, the ownership of the work would allow the copyright owner to preclude its use for learning, to deplete the public domain, and to make public access a matter of the copyright holder's discretion. Further, to use statutory copyright to vest ownership of the work in the author is to make the author, not the public, the primary beneficiary of copyright, which does not make sense from a policy standpoint. Why should the framers draft a provision of the Constitution to give a small class of citizens—however worthy—a special benefit in the form of an absolute monopoly over learning? And if the author is the primary beneficiary, why should the reward be conditioned (on publication), limited (to the exclusive right to publish for a limited time), and predicated on a benefit to the public (by promoting learning)?

Even as a matter of history—much less logic—the author as the primary beneficiary of copyright implied by natural law does not make sense. The copyright that originated in England as a proprietary monopoly of publishers was objectionable because it gave them a monopoly of learning. The Statute of Anne designed copyright to be a regulatory monopoly in order to destroy—and prevent the recurrence of—the proprietary monopoly. A major part of the statutory scheme was to make the author the initial owner of copyright. This was significant because prior to the statute the only copyright holder was the publisher, who could obtain a copyright merely by registering the title of a work in the appropriate register book of the Stationers' Company. The drafter of the Statute of Anne (reputed to be Jonathan Swift) needed a justification for granting the copyright monopoly, other than registration of the title.

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[74] American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907).

[75] *See id.* at 299. Section 106 of the 1976 Act is codified at 17 U.S.C. § 106 (1994 & Supp. 1998).

[76] *See supra* note 11 (quoting the Copyright Clause).

The solution was to require the creation of a new work, and because authors create works, they became the named beneficiary. But the motive for naming authors the beneficiary means that they were only incidental beneficiaries. And it is time to recognize that while the publisher's copyright was designed as a proprietary monopoly, the author's copyright was designed as a regulatory monopoly.

B. *The Regulatory Monopoly and Rational Copyright Rules*

My argument is twofold: that rational copyright rules are essential for protecting and preserving the copyright policies in the Copyright Clause; and the key to rational copyright rules is copyright as a regulatory monopoly. If we assume that integrity is important in applying the law, the first point can be taken as a given. This is because integrity requires that the rules be properly related to each other and to the whole, a process for which rational rules are necessary. The second point follows from the fact that copyright as a proprietary monopoly results in irrational rules. This is inevitable because the subject of copyright—information and learning—means that copyright should accommodate—and thus allocate rights among—three classes of persons: authors, entrepreneurs, and consumers. But property is a bilateral concept, concerning the property owner and everyone else, the purpose of which is to protect the property owner. Copyright as the proprietary monopoly of copyright owners is an unsatisfactory basis for allocating the rights in relation to learning materials. From this perspective, it becomes apparent that rules of ownership are not designed, and cannot provide a reasonable basis for resolving the conflicts that inevitably arise in the domain of copyright law, unless the decision is always to be in favor of the copyright holder. The basis for the decision should not be rules of ownership, but the conduct of the parties in relation to each other, whether the parties are authors, entrepreneurs, or consumers. This is the trade regulation approach.

Once we accept the idea that copyright is an author's right in name only, we can recognize that the Statute of Anne made copyright a regulatory monopoly to promote learning and to limit the utility of copyright as a device of monopoly and censorship. The statutory copyright was a means of regulating trade in much the same way its predecessor (the stationers' copyright) was a means of monopolizing trade. The conclusion that the statutory copyright was designed to regulate the book trade is so obviously true that we do not have to resort to history to support this conclusion. The language of the Copyright Clause itself tells us that copyright can be only a regulatory, not a proprietary, monopoly. It could not be otherwise if copyright is to promote learning, to protect the public domain, and to provide public access. There are, however, two questions to be answered. Since copyright even as a regulatory monopoly is property, what kind of property is it? And if it is so clear that statutory copyright began as a regulatory monopoly, why was this understanding lost?

Of the various property concepts, ranging from fee simple title to estates of various kinds to easements, the easement is the most likely candidate for defining the

property of copyright. One of the disadvantages of most property law is that it tends to be rule-bound in the interest of certainty, at least when the issue is a controversy between two property claimants. Once a property rule is established, it is difficult to use reason alone to uproot it, as the rule against perpetuities demonstrates. The easement, however, is an exception to the rigidity of property rules generally in that it is flexible, presumably because it is a limited property right. Thus an easement can be defined as a right to use property that one does not own, and can be used to allocate use of the same property among different persons or classes of persons. An easement, in short, is a limited right to which property owned by another is subject (for example, an easement for power lines), a definition that describes copyright, which is a series of rights to which a given work is subject (for example, to reproduce the work in copies or to perform the work publicly). Parenthetically, one of the characteristics of an easement is that the use does not result in a destruction of the property used, and, of course, copyrighted works can be used without being consumed. The loss of copyright, for example, does not mean the loss of the right to publish the work, only the loss of the exclusive right to publish it.

Therefore, as a matter of public policy, copyright must accommodate three classes of persons—authors, entrepreneurs, and consumers—each of which has an easement either by conduct, contract, or law. The author has an easement to use public domain material in creating a work (by conduct); the entrepreneur has an easement to market the works (by contract with the author); and the consumer has an easement to use the works for learning and entertainment (by law). The unique aspect of copyright is that the subject of the easements, the work, is not capable of ownership otherwise. This is because the essence of all copyrighted works is ideas, and it is basic law that copyright does not protect ideas, only their expression, a rule that is necessary to protect the distinction between the copyright and the work and to prevent copyright from invading the free speech domain. The expression represents the easement of the author; the distribution of the expression represents the easement of the entrepreneur; the right of personal use represents the easement of the consumer.

This analysis suggests the answer to the second question: why was the idea of copyright as an easement lost? An easement presupposes property owned by someone other than the person holding the easement. In the beginning of statutory copyright, it was understood that there was a distinction between the copyright and the work. The property owned was the copyright, not the work. As provisions of the Statute of Anne and the Copyright Clause of the U.S. Constitution make clear—and as confirmed by rulings of the U.S. Supreme Court—copyright was essentially the right to reproduce a work in copies.[77] The distinction was lost primarily because of the common law copyright and the fiction that statutory copyright is an author's right. If

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[77] *See, e.g.*, Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182, 188 (1909) (holding that the copyright statute gives author "the exclusive right to multiply copies for a limited period"); Bong v. Alfred S. Campbell Art Co., 214 U.S. 236, 245 (1909) (stating that the "purpose of copyright law is. . . to secure a monopoly, having a limited time, of the right to publish the production").

the author owned the copyright of the work he or she created, surely the author owned the work. The fiction, however, ignores the fact that the copyright and the work are two different things, and the ownership of one did not imply ownership of the other.[78] Thus after the copyright term expires, the work continues in the public domain. Even so, the copyright and the work merged in the minds of copyright holders who came to think of the two as one property, which, of course, enhanced their control of the work.

The most dramatic example of the merger of copyright and work is the fair use doctrine. As created in *Folsom v. Marsh,*[79] the fair use doctrine involved only the use of the copyright because it was the right of one author to make fair use of another author's work in creating a new work. That doctrine, however, may represent one of the greatest intellectual shell games in all of jurisprudence because it is a concept treated as if it involves the taking of an author's property that diminishes the copyright monopoly when in fact it has been continually used to increase that monopoly.[80] The missing element that would make the fallacy of the "fair-use-is-a-sacrifice-of-the-author" apparent is a knowledge of the limited nature of copyright in the nineteenth century when Joseph Story created the fair use doctrine to enlarge the author's rights. Prior to *Folsom,* it was fundamental copyright law that another author could abridge, translate, or dramatize another's copyrighted work to create another work without infringing the copyright.[81] This meant that prior to fair use, one could use the entire work to create another work; after fair use, one could use only a portion of a work to create another work. When properly understood, then, the fair use doctrine played a major role in the expansion of the proprietary base of copyright that obscured copyright's nature as a trade regulation concept.

The harm was more serious than has been recognized, for copyright as a trade

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[78] Dowling v. United States, 473 U.S. 207, 217 (1985) ("[T]he property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple 'goods, wares, [or] merchandise,' for the copyright holder's dominion is subjected to precisely defined limits.").

[79] 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

[80] An obvious example is the Classroom Guidelines. A subtle example is the contingent copyright protection in factor four of section 107 of the 1976 Act. 17 U.S.C. § 107 (1994). *See generally* L. Ray Patterson, Folsom v. Marsh *and Its Legacy,* 5 J. INTELL. PROP. LAW 431 (1998) (providing a critical analysis of the origin of the fair use doctrine).

[81] The author's

> exclusive property in the creation of his mind, cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them. When he has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms copy, or copyright.

Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514), *in* C. O. Bull. 15 at 2484 (holding that the German translation of Uncle Tom's Cabin is not an infringement of copyright).

regulation has a more subtle, and perhaps more important, role in the administration of copyright law than allocating rights. Because one of the purposes of trade regulation is to provide a remedy for a competitor's unfair conduct in trade, if we treat copyright as trade regulation rather than property, we will be able to focus on rules of conduct rather than rules of property to determine the propriety of the parties' actions. The value of this approach is that it avoids the rule-bound approach of property and makes the conduct of the copyright owner as well as the alleged infringer a part of the infringement equation. If, for example, the copyright holder ceases to publish a work, the right of fair use should be expanded; and an alleged infringer who steals the manuscript of a book to copy a portion for a news article should be denied the defense of fair use. The point is that copyright holders have duties as well as rights, as the concept of copyright misuse implies. The development of this doctrine, however, is hindered by copyright as a proprietary monopoly because one of the rights of property, the right of use, implies the right of misuse. So long as the public is not endangered, misuse is a minor anomaly that may be condemned but seldom remedied. One can tear down one's house, but one is not free to burn it and place neighboring houses at risk.

The easement theory is a sound basis for resolving the copyright conflict between property rights and political rights for new communications technology in the new millennium for a very simple reason. The source of the conflict is the designation of copyright as a proprietary monopoly. The easement theory returns copyright to its historical base as a regulatory monopoly to serve the public interest. But there is still another question to be answered. Why should we return to copyright as it was when moveable type was the computer of the day? After all, new problems require new solutions. The best answer to the question, perhaps, is that the fundamentals of copyright law do not change with communications technology. Regardless of the form the communication takes—printing press, television, or computer—it is important that copyright promote learning, that the public domain be protected, and that the right of access to learning material be preserved. This is another way of saying that integrity is important in the administration of copyright law, and this integrity is dependent in large measure on a body of logical and coherent rules.

C. *The Relevance of* International News Service v. The Associated Press *to Copyright for the New Millennium*

The paradigmatic copyright for the new millennium will be the transmission copyright, of which the DMCA is merely an early example. While there is serious question as to whether it will pass constitutional muster, that statute can serve as the exemplar of copyright legislation for protecting a service. This is contrary to the traditional copyright, a monopoly that protects the material (a book) that is the subject of the service (distribution by publication). The monopoly of the material provides a monopoly for the service, but when the subject of the monopoly is the material, it is

a relatively simple task to limit the scope of the monopoly of both the material and the service. It is necessary only to terminate the monopoly of the material. To provide a monopoly for the service, however, is to forfeit the traditional protection limiting the copyright monopoly.

This is not readily apparent for two reasons. First is the use of fictions. The condition for the copyrighted material and the copyrighted service is ostensibly the same—the creation of an original work by an author. But the condition of a creation by an author is reduced to a fiction. Who, for example, is the author of a televised NFL football game? And is it really true that the compiler of judicial cases for an electronic database is actually an author? Second, the copyright protection for both the material and the service enable the copyright holder to control the conduct of the consumer in relation to the material. But the control of the consumer's conduct ends when the consumer purchases the copyright of the material. The control of the conduct of the consumer when the service is protected continues and the consumer must satisfy the condition of the copyright holder, which almost inevitably will be a license for a fee.

My point is that when the rules of copyright for material are applied to copyright for a service, the result is protection beyond the limits of the Copyright Clause. This may be desirable, but it is not so desirable that we should continually use legal fictions to denigrate and defeat the policies of the Copyright Clause. But, as in many instances, the solution to new problems is suggested by the solution to a problem seemingly far removed from the present. In this instance, the solution is suggested by an old case decided in 1918, *International News Service v. Associated Press (INS v. AP)*.[82]

INS v. AP was a copyright case without the copyright. The litigants were competitors in the business of providing news dispatches to newspapers for profit. The time was World War I, and the controversy was precipitated by the fact that INS correspondents were excluded from the European theater of war for censorship violations, which led INS to use various schemes to obtain AP news dispatches to transmit to its subscribers. Such schemes included the bribery of AP employees and the taking of reports from published newspapers on the east coast to send to subscribers on the west coast. AP's news dispatches were copyrightable, but the provisions of the 1909 Act made it impractical to copyright them. Publication with notice, registration, and deposit would have been a logistical nightmare for a news organization that, we can assume, sent hundreds of unpublished news reports to hundreds of subscribing newspapers daily.

AP sued INS on the theory of unfair competition, but the Court ruled that the traditional basis of unfair competition—passing off—was inapplicable because the source of the news reports was irrelevant to the consumer. Even so, the Court was not willing to approve the conduct of INS and created the misappropriation branch of

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[82] 248 U.S. 215 (1918).

unfair competition because defendant was reaping where it had not sown. While recognizing that there was no property right in news as to the public, the Court held that there was a quasi-property right as between competitors, who were providing news reports as a commercial service, and granted relief only until the value of the reports as news had passed. The Court did not decide the case as a copyright case because there was no copyright. Therefore, the Court could not proceed on the basis that the material (the news dispatches) was protected property. Instead, the Court proceeded on the ground that the issue involved was not protection for the material, but protection for the service of transmitting the material to clients. The transmission, however, did not give the transmitter rights in the dispatches as against the public. The Court, in effect, limited the property right in news to that of a temporary easement. And it did so by treating the case as a tort, not a property, case, thereby avoiding the rule-bound decision that property cases demand. Since the only difference the presence of copyright would have made would have been in the relief granted—presumably, the injunction would have been absolute and statutory damages would have been awarded—the case suggests that copyright law is statutory unfair competition based on the misappropriation, that is, copying, rationale.

The difference between *INS v. AP* and the DMCA protection of databases is that the DMCA provides protection for the content in order to provide protection against the ultimate consumer as well as the competitor. The question for those who claim the DMCA is constitutional is this: may Congress grant a business the power to deny a consumer the right of access to information in order to protect the business against competitors, a process normally left to market forces? Consider the fact that television developed and prospered for some thirty years in this country without copyright protection for live television broadcasts. If television station A pirated station B's programs, station B could pirate station A's programs. But this, of course, does not protect the station against the consumer, which apparently is the goal, according to the U.S. Supreme Court in *Sony Corp. of America v. Universal City Studios.*[83] The irony is that statutory copyright, created to protect the public by regulating the copyright monopoly, has been transformed into a property right to extend and protect the monopolists against the public.

We should not, however, overlook the unique nature of copyright as property: the grant that creates the property also limits the property. This fact makes it not only appropriate, but desirable, that copyright holders who seek to control the conduct of others in the use of copyrighted material should have their own conduct evaluated when they seek to hold others accountable. We need, then, to view copyright law as trade regulation, not property.

It is important, however, to understand two things. First, copyright as trade regulation will not serve to defeat the interests of copyright owners except to the

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[83] 464 U.S. 417 (1984) (holding that an individual's copying of motion pictures constituted a "fair use").

extent that the owners attempt to expand that interest beyond the boundaries of the Copyright Clause. Second, copyright as trade regulation is the key to integrity in the administration of the copyright law because it will enable courts to render decisions in light of the facts as well as the law. When copyright is treated as trade regulation, duties of the copyright holder and rights of the consumer become a part of the copyright equation. Common sense tells us that fair use is a right, not merely a defense, and once we accept this point, the copyright holder has a duty to respect the consumer's right of use. This is true whether the copyright is a publication copyright, a performance copyright, or a transmission copyright. And arguably, the transmission copyright has provided a commendable service, for it makes clear how the proprietary copyright to protect the publication and performance of works harms the public interest.

Thus, both consumers and courts are disadvantaged by copyright as a proprietary monopoly. If, for example, copyright holders use an overly broad and illegal copyright notice, the consumer has no standing to complain. Where this issues arises, courts face the idea that the work is the property of the copyright holder and have a difficult time concluding that one cannot do this with his or her property. These inhibitions are removed if courts recognize copyright as a constitutionally authorized regulatory monopoly; for they are then required to consult the Copyright Clause, the copyright statute, and judicial precedent to measure the propriety of the private law that copyright holders use, often promiscuously. And it is appropriate to take special note of an important fact—courts interpreting the copyright statute are bound by the Copyright Clause no less than Congress is bound in enacting such statutes.

It is not possible in a short paper to lay out the scheme of copyright as trade regulation in full, but there are several points to be made. Copyright law consists of constitutional law, statutory law, judicial law, and private law; copyright holders seem to be wholly unaware of the first, to ignore the second and third when those laws do not suit their purpose, and to use the fourth to override those legal rules of which they disapprove. They are able to do so because they rely on rules out of context, and courts often are not aware of the context, which makes my point. So complex a body of jurisprudence as copyright law cannot be administered in terms of rules alone, for law consists also of principles and policies. And for copyright, the policies and principles may be more important than the rules. To make the protection of copyright a matter of conduct rather than property rights is to bring the policies and principles into consideration and recognize that copyright holders have duties as well as rights.

Copyright is essentially the law of communication and communication is the life blood of a free society. And as the means of communication change, it is inevitable that copyright law will change. That change will take one of two routes: (1) the enlargement and enhancement of the copyright monopoly in order to accommodate copyright to the changes; or (2) a reevaluation of copyright to determine the appropriate accommodation to make. The first route is the one that has been taken so far, as the DMCA indicates. But the DMCA also proves the need for the second route

because that statute disregards the policies the Copyright Clause mandates, and the reason for the reevaluation of copyright is to protect those policies. As communication becomes more complex, copyright as a proprietary monopoly increasingly endangers those policies. That is the reason for understanding that copyright is a regulatory monopoly, to enable courts, unhindered by the rule-bound property law, to protect those policies. The suggestion is not radical because this approach will return statutory copyright to its origins, when it was de facto protection for free speech and a free press. The cost of disregarding the past will be the diminution of the right upon which a free society depends, the freedom to learn, a right guaranteed by the First Amendment and promoted by the Copyright Clause. Proprietary rights in information and learning not only reduce free speech rights to the status of an empty slogan, they also make a mockery of the limited copyright monopoly that the framers empowered Congress to grant.